

# Inheritance Rights of Nonmarital Children in Late Roman Law

Joshua C. Tate\*

**Abstract** — Late Roman legislation regarding the inheritance rights of nonmarital children is a tangled web of seemingly conflicting constitutions. Focusing on the period 371–428 AD, this Article argues that, when two particular Western laws from that era are considered alongside others issued at the same time, it is possible to discern some wider legislative trends that may help to contextualize the different attitudes shown toward nonmarital children. C.Th. 4.6.4 (371), a Western law beneficial to nonmarital children, can arguably be linked with another Western law issued shortly afterward granting a privilege to the daughters of actresses, another disfavored class in the late empire. On the other hand, the later Western constitution C.Th. 4.6.7 (426–427), the exact content of which is uncertain and disputed, appears to have been issued at a time when the Western consistory was especially concerned with promoting the interests of legitimate heirs. This lends support to the theory that the Western C.Th. 4.6.7 (and not a subsequent Eastern constitution hypothesized by Antti Arjava) was the law referred to in C.Th. 4.6.8 (428) as adopting a harsh position with regard to nonmarital children.

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FROM 439, WHEN the *Codex Theodosianus* became the sole source throughout the Roman Empire for imperial law issued during the period it covered,<sup>1</sup> anyone interested in the history of legislation

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\* Assistant Professor of Law, Southern Methodist University. I would like to thank Antti Arjava, Edward Champlin, Charles Donahue, Judith Evans Grubbs, Peter Garnsey, Jill Harries, Lisa Hasday, Keith Hopkins, David Johnston, Christopher Kelly, Ernest Metzger, and Boudewijn Sirks for their help with this project. My gratitude should not be taken to imply that they necessarily share the views I express herein. The research for this article was funded in part by a generous grant from the Emily Parker Endowed Faculty Research Fund at SMU Dedman School of Law.

<sup>1</sup> N.Th. 1.3 (438).

regarding nonmarital, or “natural,” children from Constantine down to 438 needed only to consult Book IV, Title VI. There, under the heading *De naturalibus filiis et matribus eorum*, the inquisitive reader would have discovered an array of constitutions, some of which seemed to repeal their predecessors and establish different substantive rules. Laws from 336 and 397, the first issued by Constantine and the second apparently confirming a law of Valens or Theodosius I, ordered any property left to natural children to be confiscated and redistributed.<sup>2</sup> Other laws, such as those issued in the West in 371 and in the East in 405, allowed various fractions of an estate to be assigned to *fili naturales*, depending on the presence or absence of legitimate heirs.<sup>3</sup> Not until the penultimate constitution in the title was a definition given for “natural children,”<sup>4</sup> who were produced from a “legitimate union” between freeborn or freed persons “without an honest celebration of marriage.”<sup>5</sup> The seeming confusion in this title of the Theodosian Code was noticed by the author of a subsequent Novel of Theodosius II, who noted that “some rather severe laws and some

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<sup>2</sup> C.Th. 4.6.3 (336), 4.6.5 (397).

<sup>3</sup> C.Th. 4.6.4 (371), 4.6.6 (405).

<sup>4</sup> Definitions are hardly commonplace in postclassical Roman law, particularly when there was some *communis opinio* as to the meaning of a term. *Filii naturales*, however, was an ambiguous term, in that it could mean natural as opposed to adopted, rather than natural as opposed to legitimate. See, e.g., D.1.9.10 (Ulp. 34 *ad ed.*) and D.38.6.1.6 (Ulp. 44 *ad ed.*) (contrasting *naturales* with *adoptivi*).

<sup>5</sup> C.Th. 4.6.7 (426?). The precise meaning of this statement, as well as the persons included by the phrase *fili naturales* over the course of the postclassical period, are disputed issues. For a glimpse at the current state of the debate, see J. Evans Grubbs, *Women and the Law in the Roman Empire: A Sourcebook on Marriage, Divorce, and Widowhood* (London 2002), 174–76; G. Luchetti, *La legittimazione dei figli naturali nelle fonti tardo-imperiali e giustinianee* (Milan 1990), 12–64; M. Sargenti, “Il matrimonio nella legislazione di Valentiniano e Teodosio” (1981), in *Studi sul diritto del tardo impero* (Padua 1986), 239–57; P. Voci, “Polemiche legislative in tema di matrimonio e di figli naturali,” in *Nuovi studi sulla legislazione romana del tardo impero* (Padua 1989), 223–36; R. Astolfi, *SDHI*, 59 (1993), 394–97 (reviewing G. Luchetti, *La legittimazione dei figli naturali nelle fonti tardo-imperiali e giustinianee*). In general, *fili naturales* seem to have been the product of what Beryl Rawson calls a “de facto marriage” (as opposed to *iustum matrimonium*), and the female partner, if not the male, was likely to be of relatively low social status. B. Rawson, “Roman Concubinage and Other *de facto* Marriages,” *TAPA*, 104 (1974), 279–305. Adeodatus, son of the young social climber Augustine of Hippo, is often cited as the classic example of a late antique *filius naturalis*: the story can be found in P. Brown, *Augustine of Hippo: A Biography* (London 1967), 61–63, 88–90. Each imperial law, however, may have had a slightly different category of *fili naturales* in mind.

rather humane laws" had been issued dealing with the succession of *filiī naturales*.<sup>6</sup> By presenting earlier constitutions in an accessible format, the Theodosian Code had exposed what appeared to be a lack of consensus in previous legislative activity on the subject of natural children.

Theodosian Code 4.6 has not survived in its entirety, a fact that presents a problem for modern scholars.<sup>7</sup> The first law in the title has long been recognized as lost,<sup>8</sup> two others survive only as fragments,<sup>9</sup> and yet another has recently been hypothesized by Arjava.<sup>10</sup> Moreover, at least one Eastern constitution seems to have been left out of the Theodosian Code altogether, and it will be argued below that a later Western law may have been omitted as well.<sup>11</sup> Based on the limited evidence we have, and various conjectures that have been or can be made, a rough chronology from Constantine to Theodosius II can be given as follows:

- C.Th. 4.6.1. Lost constitution attributed to Constantine I.
- C.Th. 4.6.2 (336 AD, entire empire). Fragmentary constitution in which Constantine I appears to restrict the inheritance rights of natural children.
- C.Th. 4.6.3 (336 AD, entire empire). Constantine I abolishes the right of senators and other high-status Roman men to devise property to their offspring by various low-status women, and provides that any property left to such children or their mothers will be restored to the legitimate heirs, or else escheat to the fisc.

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<sup>6</sup> N.Th. 22.1.3 (442). The preface to a later Novel of Justinian paints a rosier picture by asserting that emperors from Constantine onward had moved toward "moderation and a more humane judgment." N.89 pr. (539). Other sections of the same law, however, suggest that some of the enactments of these emperors did not entirely please Justinian's consistory. N.89.12, 15 (539).

<sup>7</sup> This is true, in general, of the first five books of the Theodosian Code. See J. F. Matthews, *Laying Down the Law: A Study of the Theodosian Code* (New Haven 2000), 85–87.

<sup>8</sup> C.Th. 4.6.1, surmised by Mommsen from the numbering in Manuscript T (see note 9 below).

<sup>9</sup> C.Th. 4.6.2 (336) and 4.6.7 (426?). Our knowledge of C.Th. 4.6 derives from the corresponding title in the Breviary of Alaric, which has preserved C.Th. 4.6.4 (371) and 4.6.8 (428), and a single independent Theodosian Code manuscript T that was destroyed in a fire in 1904. See A. Arjava, *Women and Law in Late Antiquity* (Oxford 1996), 13.

<sup>10</sup> See A. Arjava, "Ein verschollenes Gesetz des Codex Theodosianus über uneheliche Kinder (CTh 4,6,7a)," ZSS (RA), 115 (1998), 414–18.

<sup>11</sup> This possible lost Western law is included in this chronology between C.Th. 4.6.6 and 4.6.7, although it could have preceded C.Th. 4.6.6. See Part III below.

- C.Th. 4.6.4 (371 AD, West). Valentinian I amends the rule of Constantine and allows fathers to devise to natural children one-twelfth of the estate if legitimate heirs exist, or one-fourth in the absence of legitimate heirs.
- [Circa 371 AD (East). Valens reluctantly ratifies the law of Valentinian I for the East.]
- [371–382 AD (East). Either Valens or Theodosius I abrogates the rule of Valentinian I for the Eastern empire and prohibits devises to natural children.]
- C.Th. 4.6.5 (397 AD, West). Honorius extends the abrogation of the rule of Valentinian I to the West, prohibiting devises to natural children.
- C.Th. 4.6.6 (405 AD, East). Arcadius returns to the relatively liberal rule of Valentinian I for the East, allowing limited devises to natural children.
- [397–426 AD. Possible lost Western constitution, discussed in Part III below.]
- C.Th. 4.6.7 (426–427 AD, West). Constitution preserved in fragmentary state, contents disputed.
- [426–428 AD. Possible lost Eastern constitution, C.Th. \*4.6.7a, hypothesized by Arjava.]
- C.Th. 4.6.8 (428 AD, East). Theodosius II abrogates a recent “harsh” constitution “recently issued” and apparently returns to the rule of Valentinian I.

A mere glance at this chronology reveals a fractured story that contains several unexplained shifts in position. To date, most scholars have avoided the difficulty of interpreting this evidence by focusing either on the initial legislation of Constantine or on the later legislation enacted after the promulgation of the Theodosian Code.<sup>12</sup> The remaining legislation, which covers approximately fifty-seven years of Roman rule,<sup>13</sup> is usually passed over quickly, if mentioned at all.<sup>14</sup> Among modern scholars, only Ar-

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<sup>12</sup> On Constantine's legislation relating to *fili naturales* see most recently T. A. J. McGinn, “The Social Policy of Emperor Constantine in Codex Theodosianus 4.6.3,” *TRG*, 67 (1999), 57–73; see also J. Evans Grubbs, *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford 1995), 283–300, with further bibliography. At the other end of the spectrum, for a discussion of the *legitimatio per oblationem curiae* first proposed in N.Th. 22.1 (442) as well as Justinian's later reforms, see Luchetti (note 5).

<sup>13</sup> From C.Th. 4.6.4 (371) to 4.6.8 (428).

<sup>14</sup> Those who have written on the post-Constantinian laws contained in C.Th. 4.6 often provide a quick survey of the various legislative developments, but do not explain possible reasons for them. Such a treatment

java has concentrated much attention on the contradictory legislation between 371 and 428.<sup>15</sup>

Because Constantine has been branded with a special reputation as a Christian innovator,<sup>16</sup> the laws he issued in 336 barring certain natural children from inheriting property have been given special consideration by scholars attempting to assess the accuracy of that reputation. In the process, Constantine's legislation on *fili naturales* has been considered not only in relation to other laws on the same topic, but also in the context of other Constantinian laws on different but related topics.<sup>17</sup> Few comparisons of this kind, however, have been made with regard to the later laws contained in C.Th. 4.6.<sup>18</sup> Yet, as has been done with Constantine, one may draw interesting conclusions by considering later imperial constitutions alongside other legislation issued at the same time.

Such a method, of course, presents methodological difficulties. One problem concerns the possibility that the laws preserved in the Theodosian Code were simply ad hoc responses to random facts that came to the emperors' attention.<sup>19</sup> When an emperor was led to act because of a specific set of circumstances, however, that need not have been the sole factor behind the decision. Emperors were constantly being petitioned by various parties who

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is found e.g. in C. Fayer, *La familia Romana*, 3 (Rome 2005), 36; P. Meyer, *Der römische Konkubinat nach den Rechtsquellen und den Inschriften* (Leipzig 1895), 134–35; and F. Blume, "Legitimation under the Roman law," *Tulane L. Rev.*, 5 (1931), 257–58. J. Beaucamp, *Le statut de la femme à Byzance (4e–7e siècle) I. Le droit imperial* (Paris 1990), 197–99.

<sup>15</sup> Arjava (note 10), 414–18.

<sup>16</sup> Expressed most succinctly in Amm. Marc. 21.10.8.

<sup>17</sup> Evans Grubbs (note 12) has conducted the most thorough analysis to date that considers Constantine's legislation on natural children in relation to his other legislation, building on the work of M. Sargenti, "Il diritto privato nella legislazione di Costantino" (1975), in *Studi sul diritto del tardo impero* (Padua 1986), 1–109.

<sup>18</sup> Notable exceptions are Sargenti (note 5) and Voci (note 5), who consider the last two laws in C.Th. 4.6 in relation to contemporary legislation on marriage and related topics.

<sup>19</sup> The two surviving Constantinian fragments in C.Th. 4.6, for example, end with an unusual clause referring to a certain "son of Licinianus" who had become a member of the senate by an imperial rescript. C.Th. 4.6.2–3 (336). The retention of these clauses by the Theodosian editors is puzzling, but they suggest that Constantine may have issued his general legislation in response to a particular case. Evans Grubbs (note 12), 285–86. On the difficulty of inferring general significance from laws evoked by particular incidents, see J. Harries, *Law and Empire in Late Antiquity* (Cambridge 1999), 212.

wished a particular law to be changed, and they did not always heed these requests.<sup>20</sup>

Admittedly, emperors were prone to legislate on a wide variety of different topics within a given period, and no particular significance can be attached to the mere fact that any two laws were issued at the same time. Even laws that dealt with the same subject, moreover, would not necessarily reflect the views of the same person in the imperial bureaucracy.<sup>21</sup> As Harries has explained, "the content of imperial law was the result of the interplay of personalities in the consistory, of interest groups within and outside the imperial councils, of imperial policy and the perceived needs of the empire, of legal tradition, precedent, and custom."<sup>22</sup> Nevertheless, this description of lawmaking, *mutatis mutandis*, could also be applied to modern legislatures, and modern legislative bodies are at least theoretically capable of adopting identifiable policies on certain issues over a given period. Whether legislative trends are attributed to strong central figures or the weight of common opinion, such trends could have existed in the later Roman Empire just as they do today, and searching

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<sup>20</sup> Libanius of Antioch, for example, wrote to both Julian and Jovian asking for a special exemption from Constantine's law prohibiting property to be left to natural children, but his request was not granted in either case. A. F. Norman, ed. & trans., *Libanius' Autobiography (Oratio I)* (Oxford 1965), 191. Julian was apparently prevented by death from fulfilling Libanius' request (*Lib. Or.* 17.37). Jovian later offered a vague assertion that his wish would be granted (*Lib. Ep.* 1221.6), but failed to act on this promise. Not until 371 did a Western law enable Libanius to leave his property to his natural son, and Libanius claimed no credit for Valentinian's reform. *Lib. Or.* 1.145. Libanius did claim that Valens' reluctant ratification of the law was a manifestation of divine providence on his behalf.

<sup>21</sup> See generally Harries (note 19), 42–47. Although each law was officially attributed to the regnant emperor or emperors, legislation seems in most cases to have been instigated by a *suggestio* made by a praetorian prefect, which was translated into law by a quaestor in consultation with the imperial consistory. The procedure is described by T. Honoré, "The Making of the Theodosian Code," *ZSS (RA)*, 103 (1986), 136–39, and J. Harries, "Introduction: The Background to the Code," in J. Harries and I. Wood, ed., *The Theodosian Code: Studies in the Imperial Law of Late Antiquity* (London 1993), 8–15. Evidence of how a praetorian prefect could influence legislation on natural children is provided by N.Th. 22.1 (442). The important role played by the quaestor in the legislative process by the mid-fifth century, however, was the result of a gradual evolution over time, as explained by J. Harries, "The Roman Imperial Quaestor from Constantine to Theodosius II," *JRS*, 78 (1988), 148–51.

<sup>22</sup> Harries (note 19), 47.

for them in the surviving sources is not necessarily a wasted effort.<sup>23</sup>

As preserved in the Theodosian Code, the various laws enacted after Constantine with regard to natural children provide few clues as to the reasons why they were issued.<sup>24</sup> At best, the surviving text of the law merely states how much property may be left to natural children and their mothers in the respective presence or absence of certain legitimate heirs who have a claim to the estate. Sometimes it does not make even this clear.<sup>25</sup> The historian who looks at these laws, however, would like to know much more. Why did the emperors named in the *inscriptio*, or their advisors, decide to change the law regarding natural children? Were they motivated purely by practical reasons, or were there important ideological issues at stake? How far were they influenced by the proposers (if such there were) of change? No definitive answer can be provided to such questions, but a few plausible inferences may be made by considering each individual law in its own contemporary context.

According to one view, the tension evident in postclassical laws regarding natural children can be explained along cultural and geographical lines. In one of the earlier articles in English to discuss the relevant legislation, Hans Julius Wolff suggested that its historical development involved the efforts of imperial legislators to come to grips with a Greek custom of concubinage previously outside the sphere of Roman law.<sup>26</sup> Wolff's thesis, however,

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<sup>23</sup> We do not possess all the imperial legislation that was issued in late antiquity. Even if the Theodosian Code survived intact, which it does not, it has been argued by A. H. M. Jones, *The Later Roman Empire 284–602: A Social, Economic and Administrative Survey*, 1 (Oxford 1964), 473–76; Honoré (note 21), 161–62; and J. Matthews, “The Making of the Text,” in Harries and Wood (note 21), 41, that the sorry state of central imperial archives forced the Theodosian commission to make extensive use of scattered provincial sources. This would imply that many laws were irretrievably lost. Boudewijn Sirks assigns a more prominent role to the central archives, but he also allows that some laws were either not retrievable or were intentionally excluded. A. J. B. Sirks, *The Theodosian Code: A Study* (Friedrichsdorf 2007), 134–35, 151–52; “The Sources of the Code,” in Harries and Wood (note 21), 49–52. Yet there is no reason to think that the incomplete sample at our disposal does not reflect many legitimate legislative trends, and these are worth searching for.

<sup>24</sup> This is because the compilers were expressly instructed to omit unnecessary verbiage. C.Th. 1.1.5 (429); Matthews (note 7), 57.

<sup>25</sup> C.Th. 4.6.7 (426?) and 4.6.8 (428) are particularly ambiguous in this regard.

<sup>26</sup> H. J. Wolff, “The Background of the Postclassical Legislation on Illegitimacy,” *Seminar*, 3 (1945), 30–45.

fails to account for the known geographical origin of some of the laws in C.Th. 4.6. If the emperors allowed some property to be left to natural children out of deference to local Greek practices, one cannot explain why the first known law to make this concession was issued in the West, and was only reluctantly confirmed in the East.<sup>27</sup> Not until 405 do the laws in the Theodosian Code begin to fit into the pattern that Wolff's theory would lead one to expect, with Eastern emperors apparently adopting a more lenient tone than their Western counterparts.<sup>28</sup> The sole Western law after 405 that may have adopted a harsh attitude toward natural children,<sup>29</sup> however, has been attributed by one scholar to an Eastern quaestor dispatched to the West by Theodosius II.<sup>30</sup> Differences between East and West might help to explain the laws in C.Th. 4.6, but they did not remain constant throughout the period, and the trends concerned may have operated at the level of court politics rather than local social practice.

Apart from Wolff's theory regarding Greek custom, the most well-known explanation for the oscillations in late imperial legis-

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<sup>27</sup> C.Th. 4.6.4 (371). The place of issue is Contionacum (probably to be identified with the remains of a villa at modern-day Konz, in south-western Germany. See J. Matthews, *The Roman Empire of Ammianus* (London 1989), 401. The Western origin of this law is further evidenced by Lib. Or. 1.145, where Valens' reluctant ratification of the law is also attested. Libanius' testimony proves that the Theodosian compilers have not simply collected a Western copy of an Eastern law. The assertion of Wolff (note 26), 43, that this law reflects the strength of the Greek custom against which Roman legislators fought thus makes no sense, unless these Greek customs had somehow spread to the Rhineland. In any event, this constitution seems to have been repealed again in the East by Valens or his successor Theodosius I, although we do not possess the law in question. Honorius, when reinstating the dispositions of Constantine in the West in C.Th. 4.6.5 (397), refers to the *legibus Constantini et genitoris nostri*. This has been taken by Voci and others as a reference to Theodosius I (see P. Voci, "Il diritto ereditario romano nell'età del tardo impero. I. Le costituzioni del IV secolo" (1978), in *Studi di diritto romano*, 2 (Milan 1985), 162), but Evans Grubbs (note 12), 301, leaves open the possibility that Valens was responsible.

<sup>28</sup> C.Th. 4.6.6 (405), which returns to Valentinian's provisions, was issued at Constantinople.

<sup>29</sup> C.Th. 4.6.7 (426?).

<sup>30</sup> T. Honoré, *Law in the Crisis of Empire: 379–455 AD* (Oxford 1998), 252–57 (tentatively identifying the quaestor as Antiochus senior). Honoré acknowledges that three of the phrases he refers to in C.Th. 4.6.7 as presented in Mommsen's edition actually come from the *Lex Romana Burgundionum*, which may not have accurately reproduced the text of the original constitution. As will be seen, however, there are other reasons for thinking that C.Th. 4.6.7 was issued in 426.



lation on natural children concerns the influence of Christianity.<sup>31</sup> According to this view, Christian legislators in the later empire were divided between a desire to punish those who lived in concubinage and a feeling of compassion for the children themselves.<sup>32</sup> The idea of Christian influence on postclassical laws regarding natural children has been challenged by those who favor other explanations, such as a desire to protect the supposed purity of the Roman aristocracy.<sup>33</sup> In at least one case, however, two very different laws in the Theodosian Code seem to acquire a special connection in light of a passage from the Christian sources.<sup>34</sup> For the time being, such links will have to be accepted as interesting, but not necessarily significant, coincidences. Nevertheless, more secure connections between later Roman legislation and Christian values, the corpus of Christian literature, or the generally held social values of late antiquity, will only be uncovered by examining each law in its own particular historical context.

Rather than attempt a complete unraveling of the web of conflicting constitutions in C.Th. 4.6 — no easy task — this Article begins the process by focusing on two particular Western laws, C.Th. 4.6.4 and 4.6.7. These two constitutions have been chosen because each seems to have implemented a clear policy decision made by one imperial consistory, rather than merely ratify a change recently made in the other part of the empire; and each can be assigned a specific date (at least, in the case of C.Th. 4.6.7, if certain assumptions are made).<sup>35</sup> C.Th. 4.6.4 was the first ex-

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<sup>31</sup> Over seventy years ago, Bonfante pointed to what he saw as the tension in these laws between Constantine's harsh "Dominican" attitude of correction and Justinian's kind "Franciscan" charity. P. Bonfante, "Sulla riforma giustiniana del concubinato," in *Scritti giuridici varii. IV. Studi generali* (Rome 1925), 567.

<sup>32</sup> B. Biondi, *Il diritto Romano cristiano*, 3 (Milan 1954), 191. Proponents of this explanation do not generally cite a large number of contemporary Christian sources in support of their case, and one may justifiably wonder whether the religious influences envisioned have more in common with later Christianity than the Christianity of the later Roman empire. The views of M. Niziolek, *Legal Effects of Concubinage in Reference to Concubine's Offspring in the Light of Imperial Legislation of the Period of Dominate* (Warsaw 1980), 17, are particularly problematic in this respect.

<sup>33</sup> See Evans Grubbs (note 12), 283–304, and Arjava (note 9), 210–17. The strongest attack has been made against Constantine, whose laws prohibiting dignitaries from leaving property to their natural children have been explained as a countermeasure against the dilution of the Roman aristocracy. Sargenti (note 17), 44–45; Evans Grubbs (note 12), 289.

<sup>34</sup> C.Th. 4.6.7 and 16.8.28 (426).

<sup>35</sup> Of the other post-Constantinian constitutions in the title, the Western C.Th. 4.6.5 merely ratifies an earlier, lost Eastern constitution; the Eastern C.Th. 4.6.6 may have followed (or preceded) a lost Western

tant constitution to modify Constantine's ban on leaving property to natural children, providing instead in clear terms that one-fourth or one-twelfth of the total property could be assigned to them in the respective absence or presence of legitimate heirs. By contrast, C.Th. 4.6.7 has been transmitted in a fragmentary state, and its provisions are unclear and controversial. On the one hand, either C.Th. 4.6.7 or a missing C.Th. \*4.6.7a conjectured by Arjava established some penalty that was harsher toward natural children than that previously in force.<sup>36</sup> On the other hand, C.Th. 4.6.7 seems to have involved a fraction of one-eighth,<sup>37</sup> a figure not previously attested in C.Th. 4.6. What is undisputed is that C.Th. 4.6.7, like C.Th. 4.6.4, marked a departure from prior legislation on the subject, whether that prior legislation originated in the East or the West.

When C.Th. 4.6.4 and 4.6.7 are considered alongside other Western laws issued at the same time, it is possible to discern some wider legislative trends that may help to contextualize the different attitudes shown toward natural children, and to find some support for the traditional assumption that the Western C.Th. 4.6.7, and not its supposed lost Eastern successor, was the law referred to in C.Th. 4.6.8 as having adopted a harsh approach. C.Th. 4.6.4, beneficial to *fili naturales*, can arguably be linked with another Western law issued shortly afterwards granting a privilege to the daughters of actresses. The suggestion that C.Th. 4.6.7 was hostile to natural children, moreover, is corroborated by a favorable attitude toward legitimate heirs common in the Western legislation of the period. While these possible connections could reflect mere coincidence, they serve as a reminder that each law must be interpreted within its unique historical context.

## II.

Thirty-five years after Constantine issued legislation preventing fathers from leaving any property to certain natural children,<sup>38</sup> a new law on the subject was promulgated by the Western emperor Valentinian I:

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constitution; and the Eastern C.Th. 4.6.8 poses special difficulties discussed in Part III.

<sup>36</sup> Known from the reference to *asperitas* in C.Th. 4.6.8 (428).

<sup>37</sup> Known from *Lex Rom. Burg.* 37.4 and the *interpretatio* to N.Th. 22.1 (442).

<sup>38</sup> C.Th. 4.6.2–3 (336).

C.Th. 4.6.4 (16 August 371). Emperors Valentinian, Valens and Gratian Augustuses to Ampelius, Prefect of the City of Rome.

All provisions set forth by the laws of Constantine with reference to natural children will remain valid, subject only to the following modification. Suppose, on the one hand, that someone leaves as his heir or heirs children from a legitimate marriage, or grandchildren taking the place of children, or a father or mother. If he has had natural children from a relationship with any woman, he is allowed to donate or leave one-twelfth only of his goods or estate to the natural children or their mother. Suppose, on the other hand, that someone is survived by none of the abovementioned heirs, and has left one or more natural children by a woman with whom he copulated. If he wishes, he may, through whatever procedure he prefers, transfer by written instrument no more than three-twelfths of his property either to the woman or to the natural children.<sup>39</sup>

The rules described in this law are straightforward. If the father is survived by certain specified legitimate heirs, he may leave only one-twelfth of his property to any natural children or their mother. If none of the specified legitimate heirs survive, he may leave up to one-fourth. From the perspective of the natural children, this could not be described as an excessively generous law, had it not followed the earlier law of Constantine denying natural children any inheritance rights whatsoever. The smaller fraction that may be left in the presence of legitimate heirs may reflect a compromise between the interests of natural children and the interests of the specified legitimate heirs, and the fact that only one-fourth could be left even in the latter's absence suggests a preference for other beneficiaries, such as more distant relatives. Libanius of Antioch, however, expressed joy and relief at being able to devise some property to his natural son under the new law,<sup>40</sup> and we can only assume that other fathers of *fili naturales* felt the same way.

Since C.Th. 4.6.4 can fairly be described as a positive measure in favor of natural children, it is worthwhile to investigate whether any similar trends can be discerned in other legislation issued in the same period. This, however, presents a problem of

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<sup>39</sup> All English translations of the Latin sources are my own unless otherwise indicated.

<sup>40</sup> Lib. *Or.* 1.145.

definition. What spatial or temporal relationship must exist between two laws in order for them to reflect the same legislative climate? While there is no straightforward answer to this question, several suggestions can be made. From a spatial perspective, any discussion of legislative trends surrounding C.Th. 4.6.4 should be limited to those constitutions that were issued in the West, since the evidence does not suggest that the two imperial consistories collaborated closely in the drafting of legislation.<sup>41</sup> Libanius suggests that Valens disapproved of C.Th. 4.6.4, and only ratified it against his will.<sup>42</sup> Whatever the accuracy of this account, it suggests that the known output of the Eastern consistory during this period cannot be relied upon to reflect legislative attitudes current in the West.

It is somewhat more difficult to decide on precise temporal boundaries for this investigation. Honoré includes C.Th. 4.6.4 in a series of laws running from 1 January 371 to 30 May 372 that seem to exhibit a consistent style, although he has not ascribed this legislation to any particular quaestor.<sup>43</sup> The content of legislation, however, could reflect the views of the addressee who suggested it rather than the emperor or the quaestor and his assistants.<sup>44</sup> Publius Ampelius,<sup>45</sup> the Prefect of the City to whom C.Th. 4.6.4 was sent, is given as the addressee in certain laws from 1 January 371 to 5 July 372.<sup>46</sup> The laws sent to Ampelius that do not fall within Honoré's stylistic series, however, have no

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<sup>41</sup> See Matthews (note 7), 284.

<sup>42</sup> Id.

<sup>43</sup> Honoré (note 21), 193 n.31. The series runs from C.Th. 15.10.1 to C.Th. 8.7.12. The quaestor's role in drafting imperial laws is controversial, and it may have varied over time. It is possible that some drafting tasks were delegated to subordinate officials such as the *magister memoriae*. Matthews (note 7) 177–79. However, this does not necessarily refute Honoré's stylistic categorization of texts, since the quaestor could have instructed his subordinates to follow certain stylistic conventions. By way of analogy, it is not impossible to distinguish opinions written by certain U.S. Supreme Court justices from those of their brethren on the basis of style, even though such justices may ask law clerks to write initial drafts or edit subsequent drafts. Cf. C. Fried, "Manners Maketh Man: The Prose Style of Justice Scalia," *Harv. J.L. & Pub. Pol'y*, 16 (1993), 531–36 (discussing the distinctive style of Justice Scalia).

<sup>44</sup> See J. Harries, "Roman Law Codes and the Roman Legal Tradition," in J. W. Cairns and P. J. du Plessis, ed., *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh 2007), 97.

<sup>45</sup> On his career, see *PLRE* 1:56–57.

<sup>46</sup> F. Pergami, ed., *La legislazione di Valentiniano e Valente (364–375)* (Milan 1993), 704.

discernible connection with C.Th. 4.6.4,<sup>47</sup> and need not be taken into consideration. For lack of a better criterion, therefore, it seems best to look for any legislative trends connected with C.Th. 4.6.4 within the stylistic period identified by Honoré.

As one might expect, the numerous laws issued by the Western consistory between 1 January 371 and 30 May 372 cover a wide variety of subjects, many of which have no discernible connection with C.Th. 4.6.4. It would be difficult, for example, to draw any useful inferences with regard to natural children from constitutions dealing with the provision of horses for chariot racing<sup>48</sup> or the procedure to be followed in cases involving magic.<sup>49</sup> Much the same can be said of certain laws concerning officials in the imperial bureaucracy and their various duties.<sup>50</sup> Other constitutions treat subjects that are less removed from C.Th. 4.6.4, but the position they take is very different. Two constitutions proclaim that men who marry the daughters of breadmakers and collectors of purple-dye fish must perform the compulsory public services associated with these guilds,<sup>51</sup> and other laws prevent slaves, serfs and freedmen from being concealed from their masters and patrons.<sup>52</sup> In contrast to C.Th. 4.6.4, which made it possible for natural children to acquire greater wealth and status in some circumstances by receiving a limited portion of their father's inheritance, this legislation was aimed only at reinforcing the status distinctions of the later empire. Any possible explanation for the change in policy regarding *fili naturales* will have to be found elsewhere.

Because C.Th. 4.6.4 concerns the capacity of natural children to take by will, one might expect any other laws dealing with inheritance that were issued at the same time to provide some clues as to why such a reform was deemed necessary. Unfortunately,

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<sup>47</sup> The constitutions in question are: C.Th. 6.7.1, 6.9.1, 6.11.1, 6.14.1, 6.22.4. All of them were issued on 5 July 372. Their subject matter is the order of precedence whereby imperial officials were ranked. In addition, two undated laws that may pertain to the period under discussion — one of them addressed to Ampelius — have been preserved independently of the Theodosian Code. These laws have to do with the heresy of a certain Ursinus, but no testamentary penalties or other matters that could relate to C.Th. 4.6.4 are mentioned. See Pergami (note 46), 532–34.

<sup>48</sup> C.Th. 15.10.1 (371) and 6.4.19 (372).

<sup>49</sup> C.Th. 9.16.9–10 (371).

<sup>50</sup> C.7.44.2; C.Th. 9.3.5; C.1.28.2 (371); C.Th. 1.15.6, 15.5.1, and 8.4.12 (372).

<sup>51</sup> Collectors of purple-dye fish are dealt with in C.Th. 10.20.5 (371), and breadmakers in C.Th. 14.3.14 (372).

<sup>52</sup> C.6.1.7, 6.3.13, and 11.48(47).8 (371).

although three laws involving succession were enacted during the period under discussion, they do not shed a great deal of light on C.Th. 4.6.4. The first law concerns inheritance taxation, and provides that heirs who enter under a will must pay tribute on all fields pertaining to the estate.<sup>53</sup> A second, more involved constitution prohibits those persons who may come into a widow's estate on intestacy from blocking an honorable second marriage.<sup>54</sup> Neither of these laws has much in common with C.Th. 4.6.4. A third law is preserved only in the Code of Justinian:

C.6.22.7 (7 August 371). Emperors Valentinian, Valens and Gratian Augustuses to Maximus.<sup>55</sup>

When an emperor or empress is instituted as heir, let him or her have the same rights as others. This is also to be observed in codicils or lawfully written letters of trust. And according to the ancient laws, it is ordered that even an emperor or empress is permitted to make and change a testament.

This constitution, among other things, upholds the ability of an emperor or empress to make a testament. It might be possible to suggest that C.6.22.7 and C.Th. 4.6.4 were both influenced by a general tendency to respect the time-honored right of testators to dispose of their property as they saw fit. In the case of C.6.22.7, however, the testator in question happens to be a very important person indeed, and it is doubtful whether laws that applied only to the imperial family had much significance in the general development of Roman inheritance law.<sup>56</sup> Even so, it is worth noting that C.6.22.7 was issued only nine days before C.Th. 4.6.4, and no intervening constitutions are extant. It is not likely that the principles expressed in the former constitution had already been forgotten by the time the latter was issued.

Even if a common respect for the wishes of testators can be discerned in both C.6.22.7 and C.Th. 4.6.4, nothing in the former constitution helps to explain why it was deemed necessary to take favorable action on behalf of natural children and their mothers.

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<sup>53</sup> C.Th. 11.1.17 (371).

<sup>54</sup> C.Th. 3.7.1 (371).

<sup>55</sup> Praetorian Prefect of Gaul. See *PLRE* 1:577–78.

<sup>56</sup> J. Gaudemet, "La transmission des constitutions relatives au droit successoral au Bas-Empire et dans les royaumes barbares," *RIDA* (3rd), 7 (1960), 433; see also J. C. Tate, "Codification of Late Roman Inheritance Law: *Fideicommissa* and the Theodosian Code," *TRG*, 76 (2008) (forthcoming).

If the connection between these laws is the best result that can be obtained by considering C.Th. 4.6.4 in its contemporary context, one might well question the utility of this approach to the sources. Fortunately, however, the stylistic period that includes C.Th. 4.6.4 does contain more promising possibilities in the form of two laws on the subject of men and women of the stage.<sup>57</sup> The first of these laws probably dates to 11 February 371,<sup>58</sup> and provides that actors and actresses cannot be recalled to the compulsory performance of theatrical spectacles if they happen to survive after partaking of Christian sacraments in expectation of death. Although the law takes care to ensure that the sacraments are only issued to those in real danger, the exemption provided is nevertheless contrary to the government's interest in providing a steady stream of theatrical entertainment.<sup>59</sup>

More relevant to the present discussion, however, is another law issued less than a month after C.Th. 4.6.4:

C.Th. 15.7.2 (6 September 371). Emperors Valentinian, Valens and Gratian Augustuses to Julian, Proconsul of Africa.

If they behave themselves so that they are regarded as respectable, Your Sincerity must protect the daughters of actresses from the fraud and disruption of disturbers. It is just to recall to the stage only those daughters of actresses who have evidently lived and are living a vulgar life by their conduct and their morals.

This law adopts a similar attitude to its predecessor, and both are part of a larger body of laws regarding performers.<sup>60</sup> The beneficiaries in C.Th. 15.7.2, however, are daughters of actresses rather than actors and actresses themselves, and the exemption is not granted only in the rare case of an accidental administration of last rites, but based on the overall behavior of such women.

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<sup>57</sup> C.Th. 15.7.1–2.

<sup>58</sup> C.Th. 15.7.1. The consular date indicates 371, but the inscription gives Viventius as Prefect of the City of Rome, an office he held in 365–367 according to *PLRE* I:972. As explained by Pergami (note 46), 539, the inscription is more likely to be in error for a number of reasons. Viventius was Praetorian Prefect of Gaul during 371.

<sup>59</sup> This is the view of Jones (note 23), 2:1020; T. D. Barnes, "Christians and the Theater," in W. J. Slater, ed., *Roman Theater and Society* (Ann Arbor 1996), 174, and others.

<sup>60</sup> See J. Evans Grubbs, "Late Roman Legislation on Women," in R. W. Mathisen, ed., *Law, Society, and Authority in Late Antiquity* (Oxford 2001), 239–41.

Henceforth, the stigma attached to actresses is not hereditary: provided that the daughters of actresses behave themselves, they are not obligated to follow their mothers' profession.<sup>61</sup> This constitution is the first surviving law to have been issued after C.Th. 4.6.4, and the two invite comparison.

The notion that actresses and actors were subject to special disabilities due to the scandalous nature of their profession has a long history in Roman law. A supposed commentary by Julian on the praetorian edict states that any person who acted on the stage was subject to the legal penalty of *infamia*.<sup>62</sup> By the reign of Augustus, the stigma attached to theatrical performance had important consequences for those who wished to marry into senatorial families, although this disability may not have been considered hereditary in other circumstances. Describing the *lex Iulia de maritandis ordinibus*, the classical jurist Paul explained that senators and their descendants by male offspring were forbidden by the Augustan legislation to marry not only an actress, but even the daughter of someone who was or had been an actor or actress.<sup>63</sup> Similar penalties were laid down with regard to daughters of senators, who were forbidden to marry both actors and the sons of actors and actresses.<sup>64</sup> Evidence from an early post-classical compilation called the "Epitome of Ulpian," however, suggests that ordinary freeborn men may have been prevented from marrying actresses but not their daughters.<sup>65</sup> Whatever the

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<sup>61</sup> It is noteworthy that C.Th. 15.7.2 is directed specifically at the daughters rather than the sons of actresses: perhaps it was seen as especially disgraceful for a respectable woman to be forced to appear on the stage simply because her mother was an actress, or perhaps male descendants of actresses needed less protection. For the latter view, see D. Daube, "The Marriage of Justinian and Theodora: Legal and Theological Reflections" (1967), in D. Cohen and D. Simon, ed., *Collected Studies in Roman Law*, 2 (Frankfurt 1991), 1227.

<sup>62</sup> D.3.2.1 (Julian 1 *ad ed.*). The penalty of *infamia* had important legal consequences for actors, discussed in C. Edwards, *The Politics of Immorality in Ancient Rome* (Cambridge 1993), 123–26. The fragment attributed to Julian does not make it clear whether actresses were affected by the praetorian *infamia*. A. H. J. Greenidge, *Infamia: Its Place in Roman Public and Private Law* (Oxford 1894), 171–75, however, argues that some of the disadvantages associated with *infamia* could have affected women as well as men, at least after Augustus.

<sup>63</sup> D.23.2.44 pr. (Paul 1 *ad leg. Iul. et Pap.*).

<sup>64</sup> *Id.*

<sup>65</sup> *Tit. ex Corp. Ulp.* 13.1, 16.2. This compilation appears to have been made in the fourth century, but there is some doubt as to whether the sources used are classical or postclassical in origin. See T. Honoré, *Ulpian* (Oxford 1992), 107; and O. F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London 1997), 64.



situation may have been in the early fourth century, Constantine specified in 336 that no property could be left by senators and various provincial officials to their children by an actress or the daughter of an actress.<sup>66</sup> This law had the effect of punishing not only the daughters of actresses, but even their grandchildren, who could no longer receive any property if their father belonged to the provincial or senatorial aristocracy. By the end of Constantine's reign, therefore, the *infamia* associated with actresses had repercussions for three generations.

As preserved in the Theodosian Code, C.Th. 15.7.2 states only that the daughters of actresses cannot be recalled to the stage if they behave in a respectable manner. No mention is made of the inheritance disabilities that some actresses and their daughters had faced since 336. Less than a month previously, however, C.Th. 4.6.4 had specified that the laws of Constantine on the subject of natural children were to be tempered so that they could receive between one-twelfth and one-fourth of their father's estate. The relevant legislation of Constantine had specifically included the children of actresses and their daughters, "whether their father calls them legitimate or natural," among those disadvantaged by his prohibition.<sup>67</sup> The daughter of an actress and a member of the senatorial or provincial aristocracy, if such a person existed, stood to benefit from both C.Th. 4.6.4 and 15.7.2: the former allowed her to inherit some of her father's estate, and the latter protected her from any person who sought to force her back to the stage. Each of these measures, in its own way, was opposed to the long-standing legislative trend by which the *infamia* associated with actresses had become hereditary. Thus, although the similarities between them have escaped the attention of modern scholars, C.Th. 4.6.4 and 15.7.2 can be seen as having something in common.<sup>68</sup>

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<sup>66</sup> C.Th. 4.6.3 (336).

<sup>67</sup> Id.

<sup>68</sup> It is interesting to speculate about whether the link between these two laws may reflect the views of a particular individual in the imperial bureaucracy. There is no way of knowing for certain what quaestor was in office during this period, but one possible candidate is Fl. Claudius Antonius 5. Symmachus *Ep.* 1.89 contains a remark that *PLRE* 1:77 has taken to indicate that this Antonius wrote tragedies. Such a connection to the theater might explain the favorable attitude shown toward actresses in C.Th. 15.7.2. It is unlikely, however, that a fourth-century quaestor such as Antonius would have been in a position to make a significant imprint on the content of legislation (Harries, "The Roman Imperial Quaestor" (note 21), 169–70). In any event, this explanation is wholly conjectural.

Taken by itself, the connection between C.Th. 4.6.4 and 15.7.2 does not carry much significance. Many laws were issued in 371 that have little or nothing to do with C.Th. 4.6.4, and it might be argued that the fact that C.Th. 15.7.2 was issued shortly after the former constitution is purely coincidental. C.Th. 4.6.4, it is true, was directed at all natural children, not merely those born from actresses or their daughters; likewise, C.Th. 15.7.2 was not specifically aimed at daughters of actresses whose fathers happened to be senators or provincial aristocrats. In addition, C.Th. 15.7.2 is exclusively concerned with females, while C.Th. 4.6.4 does not distinguish between male and female *fili naturales*. Perhaps most importantly, legislative connections that seem evident to a modern mind may not have been apparent to fourth-century Romans, and there is always the possibility that a particular actress's daughter was the inspiration for C.Th. 15.7.2.

Nevertheless, it is interesting to note the manner in which developments in the law regarding actresses and their descendants seem to parallel developments in legislation concerning natural children. As has been suggested, the year 371 marked liberal measures in both areas. The favorable trend toward actresses continued through 380–381, when the Western consistory issued two or three laws releasing actresses from their theatrical duties on condition that they pledged themselves to the Christian faith.<sup>69</sup> By 393–394, however, a different imperial attitude toward actresses was being expressed in the East, as shown by constitutions forbidding women of the stage from wearing lavish garments or dressing like consecrated virgins.<sup>70</sup> Twenty years later, a Western law, the last in the Theodosian Code title *de*

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<sup>69</sup> C.Th. 15.7.4 (380), 15.7.8–9 (381). C.Th. 15.7.4 and 9 are probably different copies of the same law, as indicated by Mommsen in his edition of the Theodosian Code. C.Th. 15.7.8 includes some vicious rhetoric aimed at those actresses who obtain an exemption on religious grounds but remain involved in scandalous activities. It also declares, however, that such an exemption will be granted to women who request it, a point which is not entirely clear in C.Th. 15.7.4 and 9. This ambivalence might reflect a turning point in the history of the relevant legislation in the West.

<sup>70</sup> C.Th. 15.7.11 (393), 15.7.12 (394). Barnes (note 59), 177, includes C.Th. 15.7.12 among legislation that freed actresses from their theatrical duties in the event they converted to Christianity, but this interpretation is groundless. The law states that actresses cannot wear the dress of consecrated virgins, but does not grant them an exemption if they do so. A provision ordering that *nulla femina nec puer thymelici consortia inbuantur, si Christianae religionis esse cognoscitur* refers to ordinary Christian women and boys, who are prevented from consorting with *thymelici*. The spirit of C.Th. 15.7.12 is quite different from that expressed in C.Th. 15.7.2 and other such laws.

*scaenicis*, recalled all actresses to the stage.<sup>71</sup> C.Th. 15.7.2 can therefore be seen as the first law to express a Western liberal trend that continued through 380–381 but had subsided by 413; if this trend ever made itself felt in the East, it was no longer evidenced there by 393–394.

This synopsis roughly fits with what we know of legislation regarding natural children during this period. C.Th. 4.6.4 was repealed in the East by Valens or Theodosius I at some point between 371 and 382,<sup>72</sup> but may have remained in effect in the West until 397, when it was abrogated by C.Th. 4.6.5.<sup>73</sup> Hence the Eastern repeal of C.Th. 4.6.4 might be seen as foreshadowing the hostile attitude toward actresses exhibited in the East in 393–394. Similarly, the likelihood that it took several years for the Eastern repeal of C.Th. 4.6.4 to be ratified by Honorius could have something to do with the probable Western origin of the more liberal trend expressed by C.Th. 15.7.2.<sup>74</sup> This correlation is admittedly tenuous, and cannot be extended to the laws in C.Th. 4.6 that postdate 397. Even so, it is not entirely implausible as an analysis of possible trends that may have affected legislation on natural children from 371 to 397.

The possible link between C.Th. 4.6.4 and C.Th. 15.7.2 could have interesting ideological implications. If the Western consistory allowed property to be left to natural children for the same reasons that it protected well-behaved daughters of actresses from the stage, this could suggest that the low social status associated with concubines and actresses was somehow different from that of breadmakers and collectors of purple-dye fish. While the latter inevitably passed their condition on to their successors, the children of the former were offered the chance of improvement, either by leaving behind the disreputable life of the stage or by receiving property from their wealthy natural fathers. Perhaps the dishonor associated with the theatrical profession and the act of concubinage was considered to be the result of a personal choice, and the moral failings of actresses and concubines were not allowed to taint their descendants.<sup>75</sup> Such thinking might explain

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<sup>71</sup> C.Th. 5.7.13 (413?).

<sup>72</sup> This has been deduced from *Lib. Or.* 1.195. See Norman (note 20), 206.

<sup>73</sup> C.Th. 4.6.5 (397).

<sup>74</sup> All of the laws granting exemptions to actresses were issued from Western cities and sent to Western officials.

<sup>75</sup> One might infer Christian influence here, but Stoic ethics might also be involved, as suggested in a similar context by Daube (note 61), 1231.

the decision taken by Valentinian's consistory with regard to natural children.

### III.

In 405, eight years after Honorius confirmed that the liberal rule of Valentinian I had been repealed in the West, another Eastern law was issued on the subject of natural children that returned to the liberal rule.<sup>76</sup> Once again, at least in the East, a father could leave one-twelfth of his property to his natural children if legitimate heirs existed, and one-fourth if they did not.<sup>77</sup> This, however, was not the last constitution on the subject. We know of at least two more laws, but our knowledge of the first of these is unusually limited, and its presentation in Mommsen's edition of the Theodosian Code is deceptive.<sup>78</sup> The following fragment of a Western law is preserved in an independent manuscript of the Theodosian Code:<sup>79</sup>

C.Th. 4.6.7. Emperors Theodosius II and Valentinian III Augustuses to Bassus, Praetorian Prefect.

We order those persons to be called natural children who were born as a result of a legitimate union without an honest celebration of marriage. It is clear, however, that those born from the womb of a slave-woman are slaves according to the law. Although, by the force of nature, the name of natural children cannot be taken away from them, nevertheless in hereditary . . .

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<sup>76</sup> C.Th. 4.6.6 (405), presented with certain changes in C.5.27.2.

<sup>77</sup> The only substantive difference between C.Th. 4.6.4 and 6 is that the former mentions the deceased's father among the heirs whose presence decreases the share that may be left to natural children, while the latter does not.

<sup>78</sup> Mommsen presents the text of *Lex Rom. Burg.* 37.3–4 as though it were part of C.Th. 4.6.7, although it is doubtful whether the Burgundian text followed the original Theodosian Code constitution with any degree of accuracy. This presentation is also employed in the English translation of the Theodosian Code edited by Pharr. See C. Pharr, ed., *The Theodosian Code and Novels and the Sirmondian Constitutions: A Translation with Commentary, Glossary and Bibliography* (New York 1952), 87. Those who make use of Mommsen's edition or the Pharr translation without paying close attention to the critical apparatus are likely to be misled, as Gaude met (note 56), 426, may have been.

<sup>79</sup> Manuscript T, which, apart from the *Lex Romana Visigothorum* and *Lex Romana Burgundionum* along with inferences from Justinian's Code, is our sole source for C.Th. 4.6.

Manuscript T breaks off at this point, and the remaining content of this law is a matter for speculation. Mommsen, in his edition of the Code, combines the above fragment with the following quotation from the *Lex Romana Burgundionum*, assumed to be a summary of the full provision:

*Lex Rom. Burg.* 37. Concerning legitimate marriages or natural children.

3. If natural children were born from a slave-woman and not manumitted by their master, they count as slaves that are part of the estate.

4. But if natural children were born from a freeborn woman, a freedwoman, or certainly the daughter of a freedwoman, it is not permitted to give more than one-eighth of the estate to the mother along with the natural children. The nuptial donation must be excluded from this calculation, so that the allotted eighth owed by law to the natural children comes out of the goods in excess of the nuptial donation. If anything more was left to them by donation, by testament, or by any intervening person, it will be lawfully reclaimed by the legitimate heir, according to a law of the Theodosian Code that was issued with regard to natural children and their mothers.

This passage claims to cite a law of the Theodosian Code, and the reference to natural children born of a slave woman calls to mind the surviving fragment of C.Th. 4.6.7. *Lex Romana Burgundionum* 37.4, however, does not make it clear whether the one-eighth that may be left to natural children depends upon the presence of legitimate heirs.

The *interpretatio* to a later Novel of Theodosius II (N.Th. 22.1) claims that it was established "in the Theodosian corpus" that one-eighth may be left to natural children when legitimate descendants exist.<sup>80</sup> Such a provision would have been even more generous than C.Th. 4.6.4, which allowed only one-twelfth to be left under these circumstances, and the explanation in the *interpretatio* causes one to wonder why the Visigoths did not include the one-eighth provision in their codification instead of C.Th. 4.6.4. Moreover, there is a third piece of evidence that must be taken into account. C.Th. 4.6.8, an Eastern law from 428 known from the *Lex Romana Visigothorum*, specifies that natural children are not to be "oppressed by the harshness of the law that was recently issued" (*nec . . . legis quae nuper lata est asperitate pre-*

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<sup>80</sup> N.Th. 22.1 *int.*

*mantur*), and returns to what a "prior constitution ordered with just moderation."<sup>81</sup> The "law that was recently issued" could be C.Th. 4.6.7, and the "prior constitution" envisaged could be C.Th. 4.6.6, the prior Eastern law on the subject, or some lost Western equivalent. The reference to *asperitas* could be explained if we assume that the Visigothic interpreter erred, and that C.Th. 4.6.7 actually allowed one-eighth to be left to natural children in the absence of legitimate heirs and nothing at all in the presence of legitimate heirs, an alternative not inconsistent with *Lex Rom. Burg.* 37.4.<sup>82</sup> This could have happened, for example, if there was a division of labor among the Visigoths, and the interpreter who commented on N.Th. 22.1 was not the same person as the interpreter and/or editor responsible for C.Th. 4.6.

If there were multiple Visigothic interpreters and editors, all working with the full Theodosian Code, it is not difficult to see how an error might have occurred. Unlike the interpreter and/or editor responsible for C.Th. 4.6, the interpreter commenting on N.Th. 22.1 did not read the Code title on *fili naturales* carefully. Misled by the reference to *sescunciam* (one-eighth) in C.Th. 4.6.7, the law immediately preceding C.Th. 4.6.8, the Theodosian novel's interpreter failed to notice that the earlier law in the Code, C.Th. 4.6.4, referred to *unam tantum . . . unciam* (one-twelfth only), a fraction that his Visigothic colleague had correctly reported in the *interpretatio* to C.Th. 4.6.4. The Visigothic interpreter of the Theodosian novel, in other words, was not as careful or knowledgeable about *fili naturales* as the Visigoths who were actually responsible for assembling and commenting on C.Th. 4.6. Such an explanation is corroborated by the fact that only C.Th. 4.6.4 and 4.6.8 were included in the *Lex Romana Visigothorum*. The Visigothic editor in charge of the title on *fili naturales* evidently believed C.Th. 4.6.4 to be the current law, not C.Th. 4.6.7, and the *interpretatio* to C.Th. 4.6.4 correctly states that one-twelfth may be given in the presence of legitimate heirs. Had one-eighth really been considered the percentage established in the "Theodo-

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<sup>81</sup> C.Th. 4.6.8 (428).

<sup>82</sup> This was the original view of P. Voci, "Il diritto ereditario romano nell'età del tardo impero. II. Le costituzioni del V secolo" (1982), in *Studi di diritto romano*, 2 (Milan 1985), 203–204. In his 1989 study (Voci, (note 5), 228–29), Voci leaves open the possibility that C.Th. 4.6.7 allowed one-eighth to be left to *fili naturales* in every event, in which case *asperitas* must be seen as a reference to lack of legal refinement. This does not explain, however, why the natural children were "oppressed" (*premantur*) by C.Th. 4.6.7, as stated in C.Th. 4.6.8.

sian corpus," the editor in charge of C.Th. 4.6 would have included C.Th. 4.6.7, not C.Th. 4.6.4, in the Visigothic compilation.

One potential problem with this theory is that C.Th. 4.6.7 specifies that the *donatio nuptialis* is not to be included in the calculation of the portion of the estate that may be devised to the natural children. The *donatio nuptialis*, also referred to as the *donatio ante nuptias*, was a gift given by the groom to the bride prior to the marriage, as distinguished from the dowry (*dos*), which was the gift from the bride or the bride's family to the groom.<sup>83</sup> A 382 law of Theodosius I required a remarried widow to return everything she received from her first husband to her children by that marriage, and men who remarried were "admonished" to do the same with the property they received from their first wife, so that all of the nuptial gifts would pass to the children of the marriage.<sup>84</sup> In 439, the latter admonition was later made mandatory by Theodosius II, who noted that it was common for a wife to combine her dowry with the *donatio ante nuptias* from her husband.<sup>85</sup> The reference to *donatio nuptialis* in 4.6.7, therefore, might signify that the one-eighth fraction applied in the presence of legitimate children, who would be entitled to the *donatio nuptialis* regardless of their father's will.

This is not, however, the only possible interpretation. C.Th. 4.6.4, the original law to make a distinction based on the presence of legitimate heirs, allocated the smaller fraction when the man left "children from a legitimate marriage, or grandchildren taking the place of children, or a father or mother."<sup>86</sup> Notably absent from this list is the man's widow. It would not have been impossible for a man to have *filiii naturales* by an illegitimate union, later marry a different woman, and then die survived by his legitimate wife and his natural children, but no legitimate children. In such a case, there might be a question as to the legal status of the *donatio nuptialis* given by the man to his legitimate wife. Several years after C.Th. 4.6.7, a constitution of Valentinian III would require a widow whose husband died without children to return half of her *donatio nuptialis* to her late husband's par-

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<sup>83</sup> See J. Evans Grubbs, "Marrying and Its Documentation in Later Roman Law," in P. L. Reynolds and J. Witte, Jr., ed., *To Have and To Hold: Marrying and Its Documentation in Western Christendom, 400-1600* (Cambridge 2007), 64-70; M. Kuefler, "The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law," in *J. Fam. Hist.*, 32 (2007), 352-53.

<sup>84</sup> C.Th. 3.8.2 (382), discussed in Evans Grubbs (note 83), at 69.

<sup>85</sup> N.Th. 14 = C.5.9.5 (439).

<sup>86</sup> C.Th. 4.6.4 (371).

ents.<sup>87</sup> There is no indication that the fragmentary C.Th. 4.6.7 contained a similar provision, but the Western consistory that drafted C.Th. 4.6.7 may have felt the need to clarify that the father's limited power to devise property to natural children did not encompass the *donatio nuptialis* in any event. Thus, the reference to *donatio nuptialis* does not necessarily mean that C.Th. 4.6.7 allowed the father to devise property to natural children in the presence of legitimate heirs.

Assuming an error on the part of the Visigothic interpreter, and reading 4.6.8 as referring to 4.6.7, would give us in 4.6.7 an example of an innovative law whose "harsh" provisions can be contrasted with those of C.Th. 4.6.4 and 4.6.6. After the Eastern consistory decided to return to the more generous provisions that had been established by Valentinian I, the Western consistory seems to have issued a law that allowed a small fraction of the property to be left to *fili naturales* in the absence of legitimate heirs, but refused to deprive any legitimate heirs of their inheritance. Although this account may require some awareness by the Western consistory of the legislation passed in the other half of the empire, the evidence suggests that the two consistories did not legislate in isolation, and were not always of the same mind when it came to *fili naturales*.<sup>88</sup>

Antti Arjava, however, offers a different theory. In a *Miszelle* published in the *Savigny-Zeitschrift* in 1998, Arjava suggests that another law may have existed in the Theodosian Code between 4.6.7 and what is now denoted 4.6.8. This lost C.Th. \*4.6.7a, argues Arjava, is likely to have been an Eastern law that adopted a harsh position toward natural children, perhaps taking away from them all right of inheritance as Constantine had done.<sup>89</sup> On the other hand, Arjava concludes that the Western C.Th. 4.6.7 granted the right to devise one-eighth of the estate to natural children even in the presence of legitimate heirs, as stated in the *interpretatio* to N.Th. 22.1. Arjava claims that the hypothetical \*4.6.7a eliminates the need to assume that the Eastern C.Th. 4.6.8 overturned a Western law — which, Arjava says, would have

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<sup>87</sup> N.Val. 35.8 (452); see Evans Grubbs (note 83), at 70.

<sup>88</sup> The story of Valens' reluctant ratification of C.Th. 4.6.4 is an example. The Eastern emperor was aware of the law issued in the West and agreed to ratify it, albeit reluctantly. See *Lib. Or.* 1.145. It is possible that, in the cases of C.Th. 4.6.7 and C.Th. 4.6.8, the two halves of the empire could not reach agreement, and each rejected the most recent law issued by the other. However, as discussed below, it is also possible that a lost Western law intervened between C.Th. 4.6.6 and 4.6.7.

<sup>89</sup> Arjava (note 10), 417.



been unusual, unless the Eastern emperor was prompted by some private party who sought to take advantage of a constitution not yet recognized in the East.<sup>90</sup> Thus, Arjava's chronology from 405 to 428 would run as follows:

- C.Th. 4.6.6 (405 AD, East). Eastern emperor Arcadius returns to the rule of Valentinian I, allowing limited devises to natural children, but no more than one-twelfth in the presence of legitimate heirs.
- C.Th. 4.6.7 (426–427 AD, West). Western emperor Valentinian III allows natural children to be devised one-eighth of the property even in the presence of legitimate heirs.
- C.Th. \*4.6.7a (426–428 AD, East). Eastern emperor Theodosius II reverts to the position of Constantine and bars devises to natural children outright.
- C.Th. 4.6.8 (428 AD, East). Theodosius II abrogates his own recently issued C.Th. \*4.6.7a and returns to the rule of Valentinian I.

While Arjava's conjecture seems logical up to a point, the clause *ceteris, quae de eorum matribus libertis libertinisque per novam constitutionem decreta sunt, in sua manentibus firmitate* in 4.6.8 adds some complications. Depending on the translation of *libertis libertinisque*, C.Th. 4.6.8 may be referring either to 4.6.7 or to another constitution that was originally part of the same law. If an additional constitution did exist between 4.6.7 and 4.6.8, it must have contained further provisions about *libertis libertinisque* in addition to adopting a harsh attitude toward natural children.

Although the consular date of C.Th. 4.6.7 has not been preserved, the fact that it was sent to Bassus as Praetorian Prefect means that it must have been issued during 426 or 427.<sup>91</sup> The date of 426, however, is suggested by the possible link between C.Th. 4.6.7 and the following law:

C.Th. 4.10.3 (30 March 426). Emperors Theodosius II and Valentinian III Augustuses to Bassus, Praetorian Prefect. After other things:

At no time do we permit men of freedmen status to aspire to honors or to the palatine service. We wish the following dis-

<sup>90</sup> Id., 416; see also Matthews (note 7), 284 (arguing that "ignorance of and indifference to the legislation of the other *pars imperii*" was the norm, at least by the fifth century).

<sup>91</sup> Bassus was *comes rei privatae* in 425, as shown by C.Th. 16.2.47 and 16.5.64. Volusianus took Bassus' place as Praetorian Prefect of Italy in 428 (C.Th. 1.10.8 and 7.13.22.)

tion to be observed. The children of those who have been manumitted have the right to enter the imperial service and attain a rank as high as that of assistant chief of the imperial bodyguard, a position that is by no means permitted to the freedmen themselves,<sup>92</sup> but the privileges of reverence must be preserved for the patrons or the patrons' heirs. If they are shown to be ungrateful after entering the imperial service, they will without doubt be recalled to the bond of slavery. But we will not allow men who themselves have been manumitted to be admitted to any position, however humble, in the imperial service.

Godefroy, in preparing his commentary on the Theodosian Code, had access to this constitution and C.Th. 4.6.8, but not C.Th. 4.6.7, since the manuscript containing the latter was not discovered until the nineteenth century.<sup>93</sup> Concluding that the phrase *libertis libertinisque* in C.Th. 4.6.8 referred to C.Th. 4.10.3, the great commentator deduced that another fragment linked with the latter had established a harsh penalty with regard to natural children.<sup>94</sup> This fragment conjectured by Godefroy could be identified with C.Th. 4.6.7, which would give the latter also a date of 30 March 426.<sup>95</sup> When the Eastern consistory issued C.Th.

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<sup>92</sup> Following Jacques Godefroy, *Codex Theodosianus cum perpetuis commentariis* (Leipzig 1736, orig. publ. 1665), 419, and Pharr (note 78), 92. The Latin text is corrupt here, and several alternative readings have been proposed.

<sup>93</sup> By Peyron, in 1824. See Sargenti (note 5), 247–48.

<sup>94</sup> Godefroy (note 92), 1:395–96, 419–20. Godefroy believed that this law of 426 had specified that nothing at all could be left to natural children, but he did not take into account the evidence of *Lex Rom. Burg.* 37.3–4 and N.Th. 22.1 *int.*

<sup>95</sup> The plausibility of Godefroy's interpretation depends on the translation of *ceteris quae de eorum matribus libertis libertinisque . . . decreta sunt* in C.Th. 4.6.8. In his edition, Godefroy (note 92), 1:395, inserts commas after the words *matribus* and *libertis*. The phrase would thus mean "the other things that were decreed concerning their mothers, freedmen, and the sons of freedmen," with the last two words referring to provisions contained in C.Th. 4.10.3. Mommsen, however, deletes these commas in his edition, and this has led Pharr (note 78), 87, to translate the phrase as "the provisions . . . [that] have been decreed with reference to freedwomen and daughters of freed persons who are mothers of natural children." Such women were indeed mentioned in *Lex Rom. Burg.* 37.4, but so were *ingenuae* and *ancillae*: a reference to the specific provision summarized in *Lex Rom. Burg.* 37.4 should have mentioned these other categories as well. The author of C.Th. 4.6.8 could instead be referring to those provisions of the complete constitution of 426 that are now preserved in C.Th. 4.10.3. The words *post alia* at the beginning of C.Th.

4.6.8, they could have been referring to the full constitution of which C.Th. 4.6.7 was a part, not just the fragment later included in C.Th. 4.6 by the compilers of the Code.

Although it would be somewhat puzzling, as Arjava notes, for the Eastern C.Th. 4.6.8 to have repealed a Western constitution, it is not beyond explanation, nor is it impossible to explain why C.Th. 4.6.7 could have been seen as a “harsh” law in the East. In C.Th. 4.6.8, the Eastern consistory could have acted in response to a lost petition by a legitimate heir, perhaps a refugee from provinces recently overrun by Visigoths, attempting to rely on the recent Western law. Both C.Th. 4.6.7 and 4.6.8 could constitute attempts by one consistory (the Western in C.Th. 4.6.7, the Eastern in C.Th. 4.6.8) to clarify the law in response to changes made by the rival consistory. However, it is not inconceivable that a lost Western constitution, issued at some point between 397 and 426, had returned to the law of Valentinian I, and that C.Th. 4.6.7 was repealing this lost Western law. C.Th. 4.6.7 would then constitute a final Western retreat from the liberal position, a position that could have been revived in the West either before or after the Eastern adoption in 405. C.Th. 4.6.8 would accordingly indicate a simple refusal on the part of the East to shift from the position that had governed in the whole empire prior to C.Th. 4.6.7, as shown in the following alternative chronology from 405 to 428:

- C.Th. 4.6.6 (405 AD, East). Eastern emperor Arcadius returns to the relatively liberal rule of Valentinian I, allowing one-fourth to be devised to natural children in the absence of legitimate heirs and one-twelfth in the presence of legitimate heirs.
- 397–426 AD. Lost Western constitution (not included in the Theodosian Code) returns to the rule of Valentinian I.
- C.Th. 4.6.7 (426 AD, West). Western emperor Valentinian III provides that only one-eighth can be devised to natural children in the absence of legitimate heirs, and nothing at all in the presence of legitimate heirs.
- C.Th. 4.6.8 (428 AD, East). Theodosius II refuses to ratify C.Th. 4.6.7 in the East, thus retaining the rule of Valentinian I.

Not all of the laws issued by the Roman emperors on the subject of *fili naturales* have been preserved, even in the period covered

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4.10.3 suggest that it must have been separated from something by the Theodosian compilers, and 4.6.7 is a likely possibility.

by Manuscript T.<sup>96</sup> Except for the fact that this alternative chronology requires us to assume an Eastern abrogation of a Western law, it is no less plausible to assume a lost Western equivalent of C.Th. 4.6.6 than it is to assume a lost Eastern C.Th. \*4.6.7a. Unless a new manuscript emerges, the best we can do is look at the historical context in which the laws were or would have been issued, and see which chronology seems more likely.

If C.Th. 4.6.7 was indeed connected with C.Th. 4.10.3, this would situate C.Th. 4.6.7 within a series of Western constitutions running from 9 July 425 to 7 November 426 that Honoré has isolated on grounds of style, including all the laws addressed to Bassus as Praetorian Prefect,<sup>97</sup> and the content of these laws can be analyzed. When Godefroy discerned the connection between C.Th. 4.10.3 and what we now know to be C.Th. 4.6.7, he concluded that both constitutions shared a common motive: to prevent the "dregs" of Roman society, including natural children and freedmen and their offspring, from rising to positions of authority within the state.<sup>98</sup> This concern to uphold the Roman social hierarchy is manifested in other Western laws issued in 426. One constitution, also sent to Bassus, condemns the "lofty and arrogant haughtiness" of chief tenants and men of the imperial household who attempt to claim honors in the imperial service.<sup>99</sup> Another Western law upholds "the statutory distinction between slavery and freedom," protecting masters from slave rebellions.<sup>100</sup>

A harsh Western law on the subject of natural children would fit with these other Western constitutions from 426. As we have seen, however, laws upholding the rights of masters and patrons over their slaves and freedmen were also issued in 371,<sup>101</sup> but this did not prevent the Western consistory from displaying a more lenient attitude toward natural children at that time. The mere fact that C.Th. 4.6.7 and 4.10.3 were part of a single edict need not imply a close ideological connection between the two sections. Laws were frequently issued in late antiquity that contained a variety of provisions on different subjects, as shown by the long

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<sup>96</sup> C.Th. 4.6.5 (397), for example, refers to a law of Valens or Theodosius I that was not preserved in Manuscript T. See note 27 above.

<sup>97</sup> Honoré (note 30), 252–57.

<sup>98</sup> Godefroy (note 92), 420: . . . *ex his iam de Valentiniani tertii mente h.l. liqueat, nempe Rempubl. liberare eum satagisse inhonestis viris, puta naturalibus liberis simul & libertorum heri servorum, hodie liberorum faece.*

<sup>99</sup> C.Th. 10.26.1 (426).

<sup>100</sup> C.Th. 10.10.33 (426).

<sup>101</sup> C.6.1.7 (slaves), 6.3.13 (freedmen).

Eastern edict addressed to Hierus that contained C.Th. 4.6.8.<sup>102</sup> To infer hostility to natural children in C.Th. 4.6.7, we must have a more specific explanation.

By reducing the amount of the estate that could be left to natural children, either C.Th. 4.6.7 or the conjectured C.Th. \*4.6.7a made things more difficult for *fili naturales* and fathers who wished to leave them property. In the process, however, other parties stood to gain. Under the system established in 371, a father could leave up to one-twelfth of his estate to natural children if he were survived by children, grandchildren by sons, or his mother or father.<sup>103</sup> The "harsh" law mentioned in C.Th. 4.6.8 seems to have ruled out this possibility, with the effect that the abovementioned legitimate heirs might hope to obtain a greater share in the estate.<sup>104</sup> Although the testator might still disinherit his legitimate children, grandchildren, or parents, provided that he did not do so in favor of the *fili naturales* (and subject to the limitations of the *querela inofficiosi testamenti*),<sup>105</sup> the legitimate heirs were certainly made no worse off by virtue of a ban on devises to natural children, and they might stand to gain if they were next on the father's preference list. Similarly, by reducing or eliminating (in comparison with the rule of Valentinian I) the amount that could be left to natural children in the absence of parents, children, or grandchildren by sons, either C.Th. 4.6.7 or the lost C.Th. \*4.6.7a improved the prospects of other, more distant relatives who could benefit if the will were deemed to be invalid.<sup>106</sup>

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<sup>102</sup> Voci (note 5), 230. Sargenti (note 5), 245–47 n.8, suggests that these laws formed three separate edicts issued on the same day, but his argument is not convincing: there is no reason to think that C.Th. 4.6.8 could not be part of an edict *de diversis negotiis* along the lines of N.Val. 35 (452) or N.Mai. 7 (458).

<sup>103</sup> C.Th. 4.6.4. The decedent's father is not mentioned in C.Th. 4.6.6 (405), but otherwise the rule is the same.

<sup>104</sup> In general, testators tended to prefer their immediate family over all other potential heirs. This is explained with reference to the classical period by E. Champlin, *Final Judgments: Duty and Emotion in Roman Wills, 200 B.C. – A.D. 250* (Berkeley 1991), 107–30.

<sup>105</sup> It is possible that some fathers might have been able to evade the imperial restrictions (and the *querela* in general) through *fideicommissa* on intestacy. See D. Johnston, *The Roman Law of Trusts* (Oxford 1988), 153.

<sup>106</sup> The testator, of course, could have left this share to friends who were not part of his extended family, or even to the emperor himself. Both of these practices are well attested for the classical period (Champlin (note 104), 142–53), and there is no reason to think matters would have been different in late antiquity. Whenever a testator who had no legitimate

When these positive effects with regard to other potential heirs are taken into account, a "harsh" law on *filiī naturales* would seem to fit well with several Western laws issued during the period under discussion. A long law addressed to the Roman senate, for example, set down new rules concerning the acquisition of the property of a deceased child by his or her father or mother, and specified that the parent would retain only the usufruct of such property if he or she chose to remarry.<sup>107</sup> These provisions seem to have been aimed at ensuring that this property would pass to the legitimate children of the first marriage after the parent's death.<sup>108</sup> The rights of emancipated children, moreover, were protected by a clause preventing gifts made to them by their parents from being revoked without good cause.<sup>109</sup> Like the laws restricting the inheritance rights of *filiī naturales*, such legislation attempted to improve the position of legitimate children by imposing restrictions on the rights of the parents.

The most interesting example of a Western law issued during this period that protected the rights of legitimate offspring is found not in the section of the Theodosian Code dealing with inheritance, but under the rubric "Concerning Jews, Caelicolists, and Samaritans":

C.Th. 16.8.28 (8 April 426).<sup>110</sup> Emperors Theodosius II and Valentinian III Augustuses to Bassus, Praetorian Prefect.

If one or more sons, daughters or grandchildren of a Jew or Samaritan have left the shadows of their own superstition and turned with better counsel to the light of the Christian faith, their parents, i.e. their father, mother, grandfather, or grandmother, may not disinherit them, pass them over in silence, or leave them less than they could obtain if they were called to the estate on intestacy. . . . If, however, it can

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children left property to his *filiī naturales*, however, any agnates who thereby received a lesser share in the estate would have felt justified in complaining to the emperor and suggesting a change in the current law. Thus the consistory may have hoped that limiting the share that could be left to natural children would have silenced the frequent appeals made by disadvantaged agnates.

<sup>107</sup> C.Th. 5.1.8 (mother), 8.18.10 (father) (426).

<sup>108</sup> M. Humbert, *Le remariage à Rome: étude d'histoire juridique et sociale* (Milan 1972), 434–35.

<sup>109</sup> C.Th. 8.13.6 (426).

<sup>110</sup> This law may be linked with C.Th. 16.7.7, which prohibited apostates from making donations or wills. See A. Linder, *The Jews in Roman Imperial Legislation* (Detroit 1987), 313–19.

clearly be proven that such children or grandchildren committed an extremely serious offence against their mother, father, grandfather or grandmother, the exaction of revenge against them will be possible if a charge has been brought in the meantime in accordance with the law. Under such a clause, supported by provable and manifest documents, the parents will leave them only the Falcidian fourth of the succession which is due,<sup>111</sup> so that they will be regarded as having earned at least this in honor of their chosen religion. . . .

The substance of this constitution is clear. Jewish and Samaritan children who convert to Christianity cannot be passed over in their parents' wills or left less than they could obtain on intestacy. Even if they are guilty of some grievous offence against their parents, they must still receive at least one-fourth of their prospective intestate share. These are generous provisions,<sup>112</sup> and this law was probably motivated in part by the desire to encourage such children to convert to Christianity.<sup>113</sup> Yet it also exhibits the same concern for legitimate children reflected in several contemporary constitutions unrelated to religious issues. Despite their conversion to Christianity, these children remained legitimate issue of their parents, and it would have been unjust for them to be disinherited simply because their parents had not also embraced the "true religion."

Taken as part of a series of Western laws defending the rights of legitimate children, C.Th. 16.8.28 supports the notion that the Western C.Th. 4.6.7, and not an imagined Eastern C.Th. \*4.6.7a, showed an unfavorable attitude toward *fili naturales*. Like the

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<sup>111</sup> I.e., the quarter of their prospective intestate share that in other circumstances barred the *querela inofficiosi testamenti*. This share, also called the *pars legitima*, is sometimes attributed to the *Lex Falcidia* in late antiquity (cf. C.3.28.31 (528), cited by W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed. rev. P. Stein (Cambridge 1963), 328). However, the original Falcidian statute did not cover the disinheritance of particular children in favor of others, focusing instead on legacies (bequests to nonheirs). D.35.2.1 pr. (Paul *ad leg. Falc.*); B. W. Frier and T. A. J. McGinn, *A Casebook on Roman Family Law* (Oxford 2004), 386–88.

<sup>112</sup> Ordinarily, the *querela inofficiosi testamenti* could only have been brought by those who had been left less than one-fourth of their prospective share, and would have failed if the court considered the exclusion just. See Buckland (note 111), 327–31. This law not only guarantees that Christian children of Jewish parents will receive their full prospective intestate share, but even protects one-fourth if they have committed an offence against their parents.

<sup>113</sup> Linder (note 110), 314.

“harsh” law repealed in C.Th. 4.6.8, C.Th. 16.8.28 imposed limitations on the testamentary freedom of certain Roman parents. A passage in the New Testament, however, suggests that the relationship between the likely C.Th. 4.6.7 and 16.8.28 — issued less than ten days apart — may have been even stronger. Explaining to the Galatians why they should distance themselves from the Jewish law, Paul of Tarsus made use of a fascinating allegory:

Gal. 4:21–31. Tell me, you who desire to be subject to the law, will you not listen to the law? For it is written that Abraham had two sons, one by a slave woman and the other by a free woman. One, the child of the slave, was born according to the flesh; the other, the child of the free woman, was born through the promise. . . . Now Hagar is Mount Sinai in Arabia and corresponds to the present Jerusalem, for she is in slavery with her children. But the other woman corresponds to the Jerusalem above; she is free, and she is our mother. . . . Now you, my friends, are children of the promise, like Isaac. But just as at that time the child who was born according to the flesh persecuted the child who was born according to the Spirit, so it is now also. But what does the scripture say? “Drive out the slave and her child; for the child of the slave will not share the inheritance with the child of the free woman.”<sup>114</sup> So then, friends, we are children, not of the slave but of the free woman.”<sup>115</sup>

According to this story, the Christians were the legitimate heirs of Abraham, while the Jews were akin to *fili naturales ex ancillae utero*. A member of the Western consistory familiar with this passage could have seen 16.8.28 and a harsh C.Th. 4.6.7 as related measures. Just as the latter may have protected the shares belonging to legitimate heirs against encroachments by natural children, so did the former protect Christian heirs — the legitimate heirs of Abraham — against those who remained Jews and were like the children of a slave-woman. This hypothesis cannot be confirmed, but it is an intriguing possibility.

In conclusion, the context in which C.Th. 4.6.7 was likely issued suggests that it could indeed have been that partially known Western law, and not a completely lost Eastern successor, that C.Th. 4.6.8 referred to as having reached a harsh result with regard to natural children. The most significant objection to this explanation is that it would require the Eastern emperor to have

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<sup>114</sup> Gen. 21:10–11.

<sup>115</sup> Translation of the *New Revised Standard Version*.



taken notice of a recent Western law, which Arjava and Matthews have suggested would have been unusual,<sup>116</sup> but it is at least possible.<sup>117</sup> Nevertheless, this analysis has focused only on the surviving Western evidence. A truly comprehensive approach would need to analyze the Eastern constitutions as well, to see whether a hypothetical C.Th. \*4.6.7a would have mirrored any evident Eastern legislative trends during the period under discussion.

The prospect of situating the hypothesized lost Eastern constitution in its historical context is made difficult by the fact that we do not know precisely when C.Th. \*4.6.7a would have been issued, if indeed it was issued, except that it would have postdated the known Western C.Th. 4.6.7 (and decoupling C.Th. 4.6.7 from C.Th. 4.10.3 leaves us without a precise date for the former).<sup>118</sup> Even a difference of a few months might be significant if it corresponded to a change in imperial personnel.<sup>119</sup> Moreover, to be consistent with the above approach, it would be necessary to consider other laws addressed to the same official as was C.Th. \*4.6.7a, in addition to laws attributed to the same quaestor; and, of course, the addressee of the hypothetical C.Th. \*4.6.7a is not

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<sup>116</sup> Matthews (note 7), 284; Arjava (note 10), 416.

<sup>117</sup> The opposite could certainly happen, as seen in C.Th. 12.1.158 (398), in which the Western emperor Honorius refused to apply a recent Eastern law, "if it existed," since he deemed it harmful to his part of the empire. Matthews explains this constitution as reflecting the fact that "the inhabitants of southern Italy were perhaps more exposed than most to the influence of eastern claims, and sufficiently emboldened to put to the western emperor an argument based on his colleague's legislation." Matthews (note 7), 284. The fact that imperial legislation was written in Latin could also have made inhabitants of the Western part of the empire more aware of Eastern laws than vice versa. Cf. Harries (note 44), 95–96 (noting that, while "Latin was the language of government, among the governors . . . Greek was the language of communication with the populations of the Eastern Empire"); but cf. Matthews (note 7), 29 (acknowledging the continuing importance of Latin as the language of "law and the central administration" when the Theodosian Code was published). Given the frequent back-and-forth over several decades between the two parts of the empire on the subject of inheritance by *filii naturales*, however, it seems at least conceivable that a Western law adopting a novel approach to the question could have come to the attention of the Eastern emperor.

<sup>118</sup> The various laws of the Theodosian Code are in chronological order within each title.

<sup>119</sup> Honoré has identified two different Eastern quaestors who were active during 426–427, the years in which Bassus was apparently praetorian prefect in the West: E22 (1 February 425 – 1 July 426) and E23 (16 March 427 – 16 April 430). Honoré (note 30), 110–18. Without a firm date for C.Th. 4.6.7, it is difficult to say which of these periods would have seen the enactment of the supposed lost C.Th. \*4.6.7a, and thus a study of relevant Eastern legislative trends would have to take both into account.

known. In any event, given that a lost C.Th. \*4.6.7a would have been repealed almost immediately by C.Th. 4.6.8, Arjava's proposed chronology would seem to rule out any notion of a consistent Eastern legislative policy in the late 420s regarding *fili naturales*. For now, the most that can be said is that a harsh Western law regarding natural children, as an alternative to the conjectured C.Th. \*4.6.7a, would have fit well with the known output of the Western consistory circa 425–426 AD.

#### IV.

When the emperors and their advisers decided to change the law regarding *fili naturales*, they may well have been responding to suggestions made by influential persons or officials in the imperial bureaucracy. At the same time, however, they were deciding other cases where related issues were involved. In 371, the same consistory that helped men like Libanius leave property to their natural children also acted to protect the daughters of actresses from being recalled to the stage. All these measures enabled children who had been subject to legal disabilities to acquire greater social status. Half a century later, another Western consistory issued several laws aimed at defending the rights of legitimate children, and it may have issued legislation hostile to natural children with a similar purpose. In both these cases, the rough outline of a legislative policy can be discerned. The earlier consistory sought to improve the lot of social outcasts, while the later wished to promote the interests of those who claimed to be legitimate heirs.

The legislative trends outlined above are not meant to be taken as definitive. On the one hand, this analysis has covered only two out of the five laws in C.Th. 4.6 issued after Constantine: it would certainly be interesting to determine the extent to which these trends are characteristic of the period as a whole. More could be said, on the other hand, even about the two constitutions that have been discussed. C.Th. 4.6.7, for example, has been examined here in relation to contemporary laws regarding inheritance. Yet this constitution also has a place in the history of the Roman legal concept of marriage,<sup>120</sup> and it is worth considering along that dimension as well. The argument made above does not explain why C.Th. 4.6.7 reduced the portion of the estate that

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<sup>120</sup> See Evans Grubbs (note 83), 87–89; R. Orestano, "Consenso e solennità nella legislazione matrimoniale teodosiana," in *Scritti in onore di Contardo Ferrini pubblicati in occasione della sua beatificazione*, 2 (1947), 160–73; Sargenti (note 5), 239–58; Voci (note 5), 219–49.

natural children could legally claim even if no legitimate heirs existed, assuming that the Western law did indeed produce that result. Judith Evans Grubbs, however, has noted that C.Th. 4.6.7 adopted a stricter test for the validity of a marriage than had previously been applied, and that this stricter test, as well as the provisions regarding natural children, was rejected by the Eastern emperor in the set of laws that included C.Th. 4.6.8.<sup>121</sup> Whatever brought about the disagreement between the two imperial consistories in the late 420s, it involved more than just the treatment of natural children for inheritance purposes.

In a way, the connections between laws traced above are less interesting than the connections that could not be drawn. No surviving law protecting the daughters of actresses or similar persons was issued during the period including C.Th. 4.6.7, and the concern for the rights of legitimate heirs expressed in the latter is not evidenced in the series of laws including C.Th. 4.6.4.<sup>122</sup> These silences tell us as much as or more than the constitutions that do exist, for they suggest that the imperial consistory was not interested in particular legislative *topoi* at certain times.<sup>123</sup> The fact that C.Th. 4.6.4 and 4.6.7 were issued when they were, therefore, may not be a historical accident. Could changing attitudes toward Christian doctrine have something to do with such shifts in policy? The repeal of C.Th. 4.6.4 in the West might be an example. Alan Watson has argued that certain laws having to do with remarriage and the testamentary capacity of heretics that were issued in the early 380s may reflect views associated with Ambrose, whose influence as Bishop of Milan was considerable at that time.<sup>124</sup> In 397, the Western consistory finally rejected the

<sup>121</sup> Evans Grubbs (note 83), 87–88 (joining C.Th. 4.6.8 with 3.7.3).

<sup>122</sup> C.6.22.7 (371) does uphold the right of an emperor or empress to inherit, but such persons would normally have been *extranei*. C.Th. 3.7.1 (371), moreover, assigns greater authority to those near kinsmen who could *not* be called to a share in a widow's inheritance. Thus the apparent concern of 426 is absent in 371.

<sup>123</sup> It is difficult to attribute these absences to the process of compilation or transmission, since we possess a good number of laws from both periods, and the manuscripts of the Theodosian Code that contain C.Th. 15.7 and 16.8 present apparently full versions of these titles. See Matthews (note 7), 85. Some laws were probably lost before the compilation of the Code, but one would expect any major legislative trends to find at least some expression in the constitutions that were collected. Nevertheless, it must be admitted that arguments from silence are weakened by the incomplete state of the evidence.

<sup>124</sup> A. Watson, "Religious and Gender Discrimination: St. Ambrose and the Valentiniani," *SDHI*, 61 (1995), 313–26. Ambrose was acclaimed as Bishop of Milan in 374. Although the early years of his episcopate were

liberal rule of Valentinian I in a law issued at Milan a few weeks after Ambrose's death.<sup>125</sup> The imperial change of heart could conceivably have been a tribute to the famous Christian bishop, if Gal. 4:21–31 or some personal conviction had led him to express a negative opinion on the question of *filiī naturales* and their inheritance rights.<sup>126</sup> In his sermon on Abraham, for example, Ambrose warned men not to enter into unequal unions or spurn marriage, for they might have children who could not be heirs.<sup>127</sup> An imperial governor before he became a bishop, Ambrose was no doubt familiar with the legal culture of the imperial consistory, and would have been able to recognize the possible ramifications of Gal. 4:21–31 for the temporal rights of natural children. Such connections, however, are difficult to prove. All the same, future investigation into the relationship between Roman law and Christianity should be aware that Christian influence may have entailed different consequences at different times.<sup>128</sup>

Since the constitutions of the Theodosian Code have been divided into titles according to subject matter, it is not difficult to study a particular area of the law, as defined by the compilers, in isolation from the rest. Late Roman laws, however, were not issued in a legislative vacuum, and much could be gained by ceasing to treat them as such. The social and religious content of Books 15 and 16 of the Code is rarely explored in detail by scholars of Roman private law, but it may help to explain the disabilities of *filiī naturales* and other aspects of the late Roman law of inheritance. Taking this parallel evidence into account can only lead to a more sophisticated understanding of late antique legal culture.

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preoccupied with the Arian controversy, his power was consolidated in 378, and he was thereafter a figure of considerable prominence on the imperial stage. See J. Matthews, *Western Aristocracies and Imperial Court: A.D. 364–425* (Oxford 1975), 187–88.

<sup>125</sup> C.Th. 4.6.5 (28 April 397). Ambrose died 4 April 397.

<sup>126</sup> Ambrose was fond of referring to Gal. 4:21–31 and Paul's allegory concerning the two sons of Abraham: cf. *Ep.* 77 (PL 16:1264), 78 (PL 16:1267–68); *de Abraham* 1.28 (PL 14:432–33); *de apol. David* 3.11 (PL 14:356); *in ep. ad Galat.* 4 (PL 17:363–64); *in Luc.* 3.28–9 (PL 15:1600–1), 6.91 (PL 15:1692); *expl. Psalm.* 43.56 (PL 14:1115–16). This may not, however, have translated into a particular hostility toward C.Th. 4.6.4.

<sup>127</sup> *De Abraham* 1.3.19 (PL 14:427–28).

<sup>128</sup> See, e.g., J. C. Tate, "Christianity and the Legal Status of Abandoned Children in the Later Roman Empire," *J.L. & Religion*, 24 (forthcoming 2008).